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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 50

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL ANDREW SEEGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Our study of the briefs heretofore filed suggests the need for clarification along three lines:

First, the words "religion" and "religious" are frequently used in different senses instead of with one constant meaning.

Second, much of the argument, especially in the briefs *amici curiae,* is directed to the constitutionality of Section 6(j) abstractly, without focusing upon the issue before the Court.

Third, while we have shown that, in classifying persons for combatant or non-combatant national service, Section 6(j) draws a rational line, introduces no invidious distinctions, and fairly implements the purpose of accommodating the demands of na-

tional defense with the claims of freedom of religion, we failed to articulate with sufficient clarity the predicate upon which the argument rests—that the First Amendment leaves some scope for the exercise of legislative judgment in defining the classifications.

This reply brief is directed to these three points.

I

Although its central meaning is plain, the outer limits of the word "religious" are so inexact as to permit its use in quite different senses. There are writers who would include Communism in a definition of "religion."[1] The conventional dictionary definitions, as we pointed out in our opening brief,[2] are altogether different from the usage of the modern psychologist. Citations are hardly necessary to demonstrate that two or three generations ago no devout church-goer would have accepted so broad a definition as that offered by respondent and many of the *amicus* briefs.

Respondent taxes the government for asserting that Seeger's views are not "religious" when in fact they are.[3] We believe that the context in each instance makes our meaning plain, but it is irrelevant whether our usage or respondent's is linguistically correct. The essential thing is to be as clear as possible about three points as to which there can be no rational dispute:

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[1] Konvitz, "The Meaning of 'Religion' in the First Amendment: The *Torcaso* Case," *The Catholic World*, August 1963, pp. 288, 295.

[2] Brief for the United States, p. 76.

[3] Brief for Respondent, pp. 4–7.

(1) Seeger's views are "religious" as *some* careful thinkers and writers use the term. At the trial it was stipulated that some theologians whom he might call as witnesses would testify that his opposition to war is "religious" within the meaning suggested by Judge Augustus N. Hand in *United States* v. *Kauten*, 133 F. 2d 703 (C.A. 2) (R. 50). Whether they would be right depends upon the interpretation of the *Kauten* opinion as well as the characterization of Seeger's beliefs; it is also irrelevent.

(2) Whether Seeger's views are "religious" in the same sense in which religion is used in the First Amendment is in dispute. The answer obviously depends not merely upon a characterization of Seeger's views but also upon the meaning of "religion" in the amendment itself. There is also room for dispute about whether the guarantee against State interference with "religion" delimits a constant area for all the purposes of the First Amendment or has a different significance according to the subject matter of the challenged legislation. See pp. 8–11 below. The pinning of labels will not rationally decide the case.

(3) Seeger's views are not "religious" in the sense in which the word is used in Section 6(j). His statements make it very clear that his opposition to war arises from—

> essentially political, sociological, or philosophical views or a merely personal moral code

as contrasted with—

> belief in a relation to a Supreme Being involving duties superior to those arising from any human relation.

II

Respondent's brief and the briefs of *amici curiae* argue the case as if the issue were whether Congress may constitutionally grant an exemption from combatant military training and service limited to persons whose *theistic* religious beliefs include conscientious opposition to participation in war in any form, thus distinguishing between persons whose religion is theistic and others whose religion is non-theistic.[4] Our statement of the question presented has somewhat the same shortcoming for it presents for decision the question of the constitutionality of Section 6(j) "in rem."

The real question is much more specific. Seeger has no standing to secure a general ruling upon whether the limitations upon the scope of Section 6(j) make it unconstitutional in some applications. He cannot assert the constitutional rights of others. He must show that drafting him is a violation of his own constitutional rights. *E.g., United States* v. *Raines,* 362 U.S. 17, 20–22; *Virginian Ry. Co.* v. *Federation,* 300 U.S. 515, 558; *Blackmer* v. *United States,* 284 U.S. 421, 442; *United States* v. *Wurzbach,* 280 U.S. 396, 399; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U.S. 571, 576; *Steamship Co.* v. *Emigration Commissioners,* 113 U.S. 33, 39.

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[4] Brief for Respondent, 39; Brief for the American Ethical Union as *Amicus Curiae*, pp. 14–22; Brief of the American Humanist Association as *Amicus Curiae*, pp. 4–8; Brief of the American Civil Liberties Union as *Amicus Curiae*, p. 8; Brief for the American Jewish Congress as *Amicus Curiae*, pp. 3, 5–12.

Since Seeger does not fall within the exemption granted by Section 6(j), he is forced to argue that it is unconstitutional to draft him for combatant service while granting an exemption from combatant service to those who fall within the exemption. The argument has to be that he is the victim of unconstitutional discrimination which can be avoided, so long as the government exempts those within Section 6(j), only by exempting him also. To prevail, therefore, Seeger must show that, as a result of Section 6(j), the government is unconstitutionally discriminating against persons of his views.

Manifestly, all the persons outside the ambit of Section 6(j) are not to be lumped together as a single class victimized by statutory discrimination. Successfully to challenge the validity of an order to report for induction upon the ground that Section 6(j) results in an unconstitutional classification, the registrant must show that he is in a class victimized by the discrimination. One whose objection to war is admittedly based upon a purely ethical code could not attack Section 6(j) upon the ground that it unconstitutionally distinguishes between Quakers and non-theistic Buddhists, for even if that were true,[5] the

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[5] Although Buddhism is sometimes described as a non-theistic religion, it seems very likely that at least some Buddhists have a sufficient belief in a Supreme Being to satisfy the definition of religious training and belief in Section 6(j). According to a statement furnished the Bureau of the Census by Reverend S. Alex White, of the Buddhist Mission of North America, Buddhism teaches two main pathways to salvation, one of which is "to walk along the 'Path of the Pure Land,' believing in salvation through the grace of Amida (Infinite Life and Light)." Buddhism, he writes, " is neither atheistic nor agnostic. It does

discrimination against Buddhists would violate no right of the registrant's. Their religious training and belief is altogether different from his. Similarly, Seeger cannot set up the claims that might perhaps be made by Buddhists or members of the Ethical Culture Society. He must show unconstitutional discrimination against him.

The lack of a belief in obligations to a Supreme Being is only one of the characteristics of Seeger's belief. While his thinking includes much that might fairly be called philosophical as well as moral or ethical, its base is highly political at least in relation to war. Furthermore, Seeger's training and opinions contain little else that relates to "religion" as distinguished from a purely ethical code. Seeger belongs to no organized sect, follows no ritual, knows no catechism, acknowledges no scripture, worships not in a church or temple, and follows no priests. The only question here, therefore, is whether the Constitution prohibits a distinction in classification for the purposes of national service between those refusing to take part in combat because of religious opposition to war, as defined in Section 6(j), and those objecting because of personal "ethico-political" views.

The impact of the statute upon the Ethical Culture Society, Buddhists, or other groups discussed in the briefs attacking the statute, either specifically or by undifferentiated generalization, can be determined if and when those cases should arise.

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not deny or ignore a supreme reality, nor does it assert that if such supreme reality is, that man is incapable of recognizing it." *Religious Bodies* (Dept. of Commerce, 1936), Vol. II, Part 1, pp. 344–345.

III

In our opening brief we argued, first, that the First Amendment permits Congress, in providing for military training and service, to achieve an accommodation between the claims of religion and the need for equality, and therefore universality, of military obligation by exempting from combatant service those whose religion leads them to opposition to war in any form. Since there appears to be little dissent from this proposition in any of the briefs challenging the constitutionality of the statute, we rely on our original argument to establish the point.

The principal attacks upon the statute take the same line as the opinion below: the First and Fifth Amendments prohibit any differentiation between forms of religious belief; Seeger's beliefs are essentially religious within the meaning of the First Amendment, yet the Act denies him the exemption allowed to others; therefore, the argument concludes, the exemption is unconstitutional.

There are two answers to this line of argument. One is that Seeger's views, although "religious" as some psychologists and theologians use the term, nevertheless are not "religious" within the meaning of the First Amendment. We made this point in our opening brief (pp. 72–78). Fundamentally, however, our answer is more eclectic. We see no need to determine whether Seeger's views are or are not religious for all the purposes of the First Amendment. The Amendment, we submit, leaves some play in the joints when applied to legislation dealing with secular con-

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duct and allows Congress to draw reasonable lines of distinction; and we then go on to say that the lines drawn by Section 6(j) are a proper method of accommodating the need for national service to the claims of religion. Thus, the critical difference between our reasoning and the rationale of the court below (and of the opposing briefs) is that we think its major premise—that the First Amendment permits no differentiation between forms of religious belief even in relation to conduct—is itself too broad and undifferentiated because it fails to distinguish between the different kinds of legislation that may be challenged under the First Amendment and assumes that its prohibitions are coextensive regardless of the context.

The problem of delimiting the extent and character of the restrictions put upon government by the Establishment and Free Exercise Clauses arises in different contexts. When the governmental action challenged under the First Amendment attempts to punish or regulate beliefs, ritual, or the profession of beliefs, then the widest possible scope is given to the protection of "religion." Here, the central aim is to protect views about the subjects dealt with in religion; to protect proselytizing; to guarantee each

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* See *Cantwell* v. *Connecticut*, 310 U.S. 296; *Cox* v. *New Hampshire*, 312 U.S. 569; *Jamison* v. *Texas*, 318 U.S. 413; *Largent* v. *Texas*, 318 U.S. 418; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Martin* v. *City of Struthers*, 319 U.S. 141; *Prince* v. *Massachusetts*, 321 U.S. 158; *Follett* v. *Town of McCormick*, 321 U.S. 573; *Marsh* v. *Alabama*, 326 U.S. 501; *Tucker* v. *Texas*, 326 U.S. 517; *Kunz* v. *New York*, 340 U.S. 290; *Niemotko* v. *Maryland*, 340 U.S. 268.

man his own cosmology and philosophy of life; to protect professions or refusals to profess belief with respect to those subjects;[7] and to safeguard the right to engage or not engage in ritual having little or no immediate secular significance.[8] Indeed, it has been suggested that since the First Amendment protects other forms of opinion or belief there may be no need to distinguish between religious and social, political, or philosophical opinions. Konvitz, "The Meaning of 'Religion' in the First Amendment: The *Torcaso* Case," *The Catholic World;* August 1963, pp. 288, 295.

Plainly test oaths or other laws requiring or prohibiting expressions or professions of belief, like official sanctions for belief or non-belief or any variety of belief or skepticism with respect to any subject that could be brought under the head of "religion," are barred by the First Amendment. That was the holding of *Torcaso* v. *Watkins,* 367 U.S. 488. Expressions concerning the nature of religion in that context should not be uncritically transported into different contexts.

Very different problems are raised when the contention is that the State is violating the First Amendment by support of religion as in *Engel* v. *Vitale,* 370 U.S. 421, and *Abington School District* v.

[7] See *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624.

[8] See *Fowler* v. *Rhode Island,* 345 U.S. 67; *Poulos* v. *New Hampshire,* 345 U.S. 395.

Schempp, 374 U.S. 203.[9] Surely those decisions do not lead inescapably to the conclusion that a State may not contribute funds or property to teaching any of the subjects sometimes dealt with under the heading of "religion." William James suggested that religion might be taken to be (*The Varieties of Religious Experience* (1963 ed.), p. 31):

> *the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.*

Much of the world's great poetry would be barred from the classroom if *Engel* and *Schempp* apply to any subject matter within James' definition. Nor will it do to say that the poems would be read and studied only as literature. Many of the best teachers would use them to instill the feelings that stir and comfort men in their solitude.

Seeger argues that conscience is religion. Some of the *amicus* briefs argue that a moral or ethical code is religion. Does this mean that ethics may not be taught in grammar or high school with the view of inculcating in the next generation the established moral code of the community? Some observers have declared that in the United States democracy is a religion. Does it follow that the civics courses which do not treat democracy, socialism, communism, and fascism all with dispassionate neutrality violate the First Amendment?

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[9] See also *Everson* v. *Board of Education*, 330 U.S. 1; *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203; *Zorach* v. *Clauson*, 343 U.S. 306; *McGowan* v. *Maryland*, 366 U.S. 420.

Obviously such questions are not presented by the instant case. We raise them only to emphasize the error of uncritically assuming that the scope of the field occupied by the terms "religion" and "free exercise thereof" in the First Amendment is unrelated to the subject matter of the governmental action under review.

The instant case falls in a third area: legislation dealing with secular conduct resulting from beliefs. Such legislation may conflict with religious liberty either because it requires conduct inconsistent with the teachings of religion (*e.g., Reynolds* v. *United States,* 98 U.S. 145; *Selective Draft Law Cases,* 245 U.S 366; *Hamilton* v. *Regents,* 293 U.S. 245, 265, (Mr. Justice Cardozo concurring) or because the governmental regulation, in conjunction with the observance of the teaching of a religion, results in peculiar economic injury (*e.g., Sherbert* v. *Verner,* 374 U.S. 398; *Braunfeld* v. *Brown,* 366 U.S. 599). In this area, where the government is requiring or prohibiting secular conduct, its latitude, while not unrestrained, is much greater than in the situations discussed above.

The Universal Military Training and Service Act falls in this category. It does not punish Seeger because of his beliefs or lack of belief, nor does it attempt to influence his belief. It leaves him free to believe or not to believe, and to profess or not to profess, whatever faith he will. The Act requires of him military service, which is secular conduct, and it is for the refusal of such service, required of most young men, that this prosecution was brought. While the Act requires different secular conduct—different

service—from those of different views, taking the views as established facts, nevertheless it plainly has neither the purpose nor tendency to interfere with beliefs, whether religious or non-religious. And obviously the Act is not concerned with ritual, proselytizing, or professions of belief.

Nor does the Universal Military Training and Service Act fall in the field of support for religion. The exemption of religious objectors from combatant training and service and their assignment to other forms of national service, taking beliefs as facts for the purposes of classifying them, has no tendency to assist or propagate religious beliefs, and therefore does not constitute aid to religion in violation of the First Amendment. See Brief for the United States, pp. 19–33. The point remains true even if "religion," for the purposes of the First Amendment, be defined so broadly as to cover a larger area than the "religious training and belief" described by Section 6(j). For the exemption, viewed realistically, in no sense supports or influences one set of beliefs against another, whether all be within or some be without the First Amendment. Consequently, the expressions quoted by counsel from cases dealing with support of religion have no application here.

We recognize that the statute classifies men according to belief even though it takes their beliefs as facts and makes no effort to reward or punish. That much is inescapable. The necessity of drawing some line between beliefs could be avoided only if Congress were to eliminate the traditional policy of making special provision for religious objectors or were to grant an

exemption to anyone who held the opinion that he ought to refrain from military service. If any line is to be drawn at any intermediate point, it must be in terms of the beliefs or opinions upon which the registrant wishes to act.

It does not help very much to approach the problem by asking how much of the continuum is "religion" in the constitutional sense, and then saying that Congress may not draw the line somewhere within that part of the continuum which is within the scope of religion. To provide a definition of religion with exact limits, so that it covers neither more ground nor less, itself involves drawing arbitrary lines determining questions of degree and the relative importance of the different elements of religion. The definition, moreover, will depend upon the subjective concern of the definer, and even upon his religion. In the traditional view religion involves belief in a God or gods. Many churchmen would reject a definition including humanism and moral philosophy. Some psychologists and sociologists would reach a different conclusion, defining the term to reach anything that serves, for a particular individual, the inner functions traditionally served by religion. Some modern theologians, heavily influenced by psychology, have moved towards the latter view. For the Court to give any one definition of religion constitutional sanction (compare Brief for the American Jewish Congress as *Amicus Curiae*, p. 15) would seem itself to be inconsistent with the philosophy of the First Amendment.

To allow no exemption would be calloused interference with religious liberty. To allow an exemption to anyone who thought he ought to stay out of war would destroy confidence in the Selective Service System. We cannot believe that the First Amendment leaves no other course.

Of course, the classification of men resulting from differences in belief must be strictly scrutinized. Any differentiation in the classes of belief must satisfy the standards of due process established by the Fifth Amendment (*Bolling* v. *Sharpe*, 347 U.S. 497), and in applying that concept to differentiations stemming from belief the First Amendment puts a heavy burden upon the State. There is no room for differentiation that is unnecessary, invidious, or based upon judgments concerning the truth or worth of different views. All we say is that where, as here, there is neither interference with belief nor support for all religion or some religions, and where a line drawn in terms of belief is inescapable if any freedom of religion is to be secured, then there is some room for justification of a legislative classification. Stated affirmatively, if the differentiation made by Congress is the result solely of secular considerations or of the necessity for drawing a line somewhere in the continuum of thought and emotion through which political or social opinion shades into religious belief (by any definition), and if the line is justified as reasonable in those terms, then there is no violation of the First or Fifth Amendment.

The justification for the statutory differentiation between persons qualifying under Section 6(j) and

persons holding beliefs like Seeger's is the burden of our opening brief (pp. 34–83). There is no reason to repeat it here.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, we respectfully submit that the judgment below should be reversed.

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